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not to advocate allegiance to a rule of empty and meaningless technicality. It is consistent with the presumption that a statute of ambiguous or uncertain meaning is an adoption of and not in derogation or alteration of the common law.[18] It is uniquely adapted here to serving the salutary principle of strict construction of criminal statutes.[19] And of transcending importance here, it obviates the problem of constitutional objections to vagueness and uncertainty. *United States v. Miller*, 17 F. Supp. 65 (W.D. Ky.).

Such a constitutional problem exists if the word "stolen" is to be broadened beyond its common law meaning. To be sure, appellant and the cases upon which appellant relies do not make clear how they would have this statute read. Thus appellant urges the statute should be interpreted to cover "any unlawful taking" (Jurisdiction Statement, p. 4); "all situations where a vehicle is appropriated without right . . ." (App. Brief, p. 3); "any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership" (App. Brief, pp. 3-4); "any wrongful taking with intent to deprive the owner of his rights" (App. Brief, p. 10); "all types of wrongful takings" (App. Brief, p. 13, n. 6). *United States v. Adcock*, 49 F. Supp. 351, 353

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[18] See Crawford, *The Construction of Statutes*, 1940, sec. 228.

[19] It is true that no citations are necessary to show that criminal statutes should be strictly construed. But in this context we think the statement of Mr. Justice Frankfurter particularly in point: "Not that penal statutes are not subject to the basic considerations that legislation like all other writings should be given, insofar as the language permits, a commonsensical meaning. But when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication." *United States v. Universal Corporation*, 344 U.S. 218, 221.

(W.D. Ky.), whose definition appellant says the Second, Fourth, Sixth and Ninth Circuits have adopted (App. Brief, p. 5), extends the statute to any taking "without right or law . . .". But neither the *Adcock* case nor any other so holding gives definition to the limits of the coverage of the Act as so read, or shows any awareness of the problems raised thereby.

Let us read the statute to include all of these definitions, that is, as though it said "knowing the same to have been unlawfully, wrongfully or dishonestly taken without right". Each of these terms is vulnerable to serious objection, whether standing alone or used conjunctively or disjunctively with the others.

If the word "unlawfully" be considered, the question arises, under what law? If not the common law only, the Dyer Act becomes wedded to the statutory extensions of the several states, for there are no federal statutory extensions branding unlawful the taking of automobiles which can be incorporated here, nor any guides as to what provisions of other federal criminal statutes are intended to apply. But when Congress has desired to incorporate state laws into federal statutes it has done so specifically: e.g. 18 U.S.C., secs. 43, 1073, 1262, 5001; 15 U.S.C., sec. 715b. So extending this statute would necessitate an examination in each instance of state statutory law to determine if under that law the taking was "unlawful". A state could alter at will the coverage of the Dyer Act by legislating additions to or subtractions from its own proscriptions against "unlawful" taking.[20] To so interpret the Dyer Act would be to destroy the overriding principle of uniformity of federal statutes. *Jerome v. United States*, 318 U.S. 101; *United*

[20] Cf. *United States v. Brandenburg*, 144 F. 2d 656, 660.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 289

UNITED STATES OF AMERICA,

Appellant,

v.

JAMES VERNON TURLEY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE APPELLEE

SUMMARY OF ARGUMENT

Appellee contends the term "stolen", as used in the National Motor Vehicle Theft (Dyer) Act, encompasses only those situations where a vehicle transported in commerce has been appropriated under circumstances amounting to larceny as generally understood at common law. This is the holding of the Courts of Appeals for the Fifth, Eighth and Tenth Circuits and District Courts elsewhere. Decisions to the contrary are not persuasive.

A. The legislative history of the Act shows Congressional intent to combat the increasing theft of automobiles by

professional thieves and dealers operating across state lines — activities falling well within the scope of larceny at common law. Language used during debate on the Act indicates that discussion was within the framework of common law larceny. Even the word "theft" in the Act's title is a synonym for "larceny" in its common law sense. Failure of Congress on repeated occasions to amend the Act to include language specifically covering embezzlement, false pretenses and the like, as requested by the Department of Justice, shows that Congress did not intend it to encompass such offenses.

B. Use of the word "stolen" further shows Congressional intent, for the word "stolen" is a word of art, synonymous with "larceny" as defined at common law. It was so used at common law and so defined by numerous cases decided in this country prior to passage of the Dyer Act. It is a well settled rule of statutory construction, enunciated by many cases, that when such a common law term is used without definition in a statute, the term takes its common law meaning. The contrary not appearing, Congress must be presumed to have adopted the meaning of the word "stolen" as defined by this body of law. Had it wished the Dyer Act to cover offenses other than common law larceny, it could easily have used language clearly indicating that intention, as it has in many other statutes.

C. To supply by judicial interpretation such legislative omissions would be violative of the principles of strict construction of criminal statutes and would, in the case of the Dyer Act, run contrary to the primary consideration of its uniformity of application. Broadly interpreting the Act would make it dependent upon the various statutory definitions of unlawful taking in the several states. Otherwise the indefiniteness of the Act as broadly interpreted would raise serious constitutional questions.

D. The cases which have broadly interpreted the Act have failed to realize the distinction between a common law term standing undefined in a statute and one which is given special meaning in the statute itself. Without exception they have failed to give adequate consideration to the effect of their interpretations upon the administration and constitutionality of the Act.

ARGUMENT

The Term "Stolen", as Used in the Dyer Act, Encompasses Only Those Misappropriations Amounting to Larceny as Generally Understood at Common Law.

Appellee contends that the court below was correct in determining that Congress used the word "stolen" in the Dyer Act, 18 U.S.C. 2312, in the sense of larceny as defined by the common law.[1] This construction of the statute is the essence of the holdings of the Court of Appeals for the Fifth Circuit in *Murphy v. United States*, 206 F. 2d 571, the Eighth Circuit in *Ackerson v. United States*, 185 F. 2d 485, and the Tenth Circuit in *Hite v. United States*, 168 F. 2d 973.[2] These courts have found the word "stolen" to be a term having a common law meaning coterminous with common law larceny, and have applied the well settled rule that when a common law term is used in a statute it takes its common law meaning unless the statute clearly indi-

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[1] Comparison of the lower court's opinion, *United States v. Turley*, 141 F. Supp. 527 (R. 5-20) with the other opinions in this field, is sufficient to demonstrate that the lower court examined more fully than any other court has yet done the considerations entering into a determination of this Congressional intent.

[2] The same view has been adopted by a District Court in the Seventh Circuit (see *United States v. Bucur*, 194 F. 2d 298, 300, n. 1), by a District Court in the Eighth Circuit prior to the similar *Ackerson* decision (*United States v. O'Carter*, 91 F. Supp. 544, S.D. Iowa), and by another District Court in the Fourth Circuit prior to the Fourth Circuit's contrary decision in *Boone v. United States*, 235 F. 2d 939 (*Ex Parte Atkinson*, 84 F. Supp. 300, E.D.S.C.).

cates the contrary. Those decisions which have adopted a different view of the Dyer Act[3] have misconstrued the precedents upon which they rely and have failed to consider the grave problems of application raised by their giving a broad and largely undefined coverage to the Act.

A. The Legislative History Of The Dyer Act Is Consistent With The View That The Word "Stolen" Was Intended To Have A Meaning Synonymous With Larceny As Generally Understood At Common Law.

Neither in Mr. Dyer's report to the House[4] nor in the debates on the floor of Congress[5] is there any indication that direct consideration was given to the meaning of the word "stolen" in the Dyer Act. Nevertheless, what evidence of legislative intention there is to be found in the reports of the Congress lends credence to, and does not detract from, the view of appellee that the Act encompasses only common law larceny.

Mr. Dyer's report, in discussing the need for the Act, states: "Thieves steal automobiles and take them from one state to another and ofttimes have associates in this crime who receive and sell the stolen machines . . ." This language seems in accord with the finding of the court below that "The primary purpose of the Dyer Act was to combat effectively the rising traffic in stolen cars by organized

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[3] *Boone v. United States*, 235 F. 2d 939 (C.A. 4); *Breece v. United States*, 218 F. 2d 819 (C.A. 6); *Wilson v. United States*, 214 F. 2d 313 (C.A. 6); *Collier v. United States*, 190 F. 2d 473 (C.A. 6); *Davilman v. United States*, 180 F. 2d 284 (C.A. 6); *Smith v. United States*, 233 F. 2d 744 (C.A. 9); *United States v. Adcock*, 49 F. Supp. 351 (W.D. Ky.); cf. *dictum*, *United States v. Sicurella*, 187 F. 2d 533 (C.A. 2). These cases are discussed at page 17, et seq.

[4] H. Rep. No. 312, 66th Cong., 1st Sess.

[5] 58 Cong. Rec. 5470-5478, 6433-6435.

groups of thieves and dealers operating across state lines; this traffic usually involves common law larceny."[6]

During the Senate debate respecting the phrase subsequently deleted from Section 4 of the Act, "That whoever shall, *with the intent to deprive the owner of the possession thereof,* receive, etc." (emphasis added), Senator Nelson noted that the italicized phrase was surplusage because one of the elements of the offense of stealing was deprivation from the owner of the thing stolen without his consent, and that this was a "textbook" definition.[7] In speaking of such a "textbook" definition, the Senator must have had reference to treatises setting forth the settled principles of common law larceny.

Appellant draws upon the use of the word "theft" in the title of the Act and in the title of Mr. Dyer's accompanying report to the Congress to urge that Congress used the word "stolen" in the body of the Act as synonymous with "theft" rather than with common law larceny (App. Brief, pp. 4, 10). But "theft" is itself a term synonymous with larceny at common law. It was clearly so used by Blackstone: "Larceny, or *theft,* by contraction for latrociny, *latrocinium,* is distinguished by the law into two sorts . . .", 4 *Commentaries* 229. "At present we will examine the nature of theft, or larceny, as laid down in the foregoing definition", 4 *Commentaries* 230.[8]

"Theft" is equatable with "stolen", but neither imply the embezzlement charged by the information in the present

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[6] 141 F. 2d 529. And in *Smith v. United States,* 233 F. 2d 744, 747 (C.A. 9), the Court admitted that Congress was primarily concerned with misappropriations which would have been larceny at common law. See n. 27, *infra.*

[7] 58 Cong. Rec. 6434, quoted in Appellant's Brief, p. 13.

[8] Others have said that to Blackstone theft and larceny were one: *People v. Donohue,* 84 N.Y. 438, 442; *Mathews v. State,* 36 Tex. 675, 676.

case. In *United States v. Thomas*, 1895, 69 Fed. 588, 590, (S.D. Cal.), the Court said:

> "The terms 'theft' and 'embezzlement' cannot characterize the same act, because they are repugnant to, and irreconcilable with, each other . . . the charge in the indictment is that the defendant knew that the draft was stolen and embezzled; and . . . this last allegation (is) . . . the statement of a manifest impossibility, and therefore nugatory . . ."[9]

Thus, use of the word "theft" as indicated is consistent with appellee's view that Congress intended to cover only common law larceny in the Dyer Act.

With commendable candor appellant has called attention to the several efforts of the Department of Justice to amend the Dyer Act by insertion (after the word "stolen") of such words as "embezzled, feloniously converted or feloniously taken by fraud" (App. Brief, pp. 14-16). Failure of passage of these amendments may be considered in the search for the meaning of the original Act. *Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87. Existing uncertainties of meaning engendered by the conflict among judicial circuits would have given Congress every reason to adopt, and none to reject, such amendments had they represented a clarification only, rather than a change, in the intended meaning of the original Act. Appellee can only conclude that such words represented an unwanted addition to the scope of the Act.[10] No argument is needed to demonstrate

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[9] Other courts agree. See, e.g., *Pearce v. The State*, 1906, 50 Tex. Crim. Rep. 507, 509, 98 S.W. 861, 862 (". . . this is a case of embezzlement and not of theft."); *State v. Hanley*, 1898, 70 Conn. 265, 269, 39 Atl. 148, 149 (saying theft is larceny, not embezzlement); *State v. Fair*, 1904, 35 Wash. 127, 134, 76 P. 731, 733 (". . . larceny is only another name for stealing or theft.")

[10] Cf. *Federal Trade Commission v. Bunte Bros., Inc.*, 312 U.S. 349, holding that rejection by the legislature of an attempt by an administrative agency to secure specific statutory authority implies prior absence of authority.

that the language of the 1949 Senate Committee report referred to by appellant (App. Brief, pp. 15-16) does not indicate otherwise.

Appellee concludes, therefore, that the legislative history of the Dyer Act indicates that Congress intended it to cover only common law larceny.

B. It Must Be Presumed That Congress, In Failing To Give Special Meaning In The Dyer Act To The Word "Stolen", Intended To Adopt The Settled Judicial Construction Of That Word When So Used As A Word Of Art Synonymous With Larceny At Common Law.

In the absence of decisive indications of Congressional intent in the legislative history of the Dyer Act, it becomes of great importance to examine the meaning of the word "stolen" at common law and to determine through application of settled rules of statutory construction whether that meaning was adopted in the statute.

In *Hite v. United States*, 168 F. 2d 973, 975 (C.A. 10), the Court said:

> "The word 'steal' in a criminal statute ordinarily imports the common law offense of larceny."

With this statement the Courts of Appeals for the Eighth and Tenth Circuits agree.[11] Ample authority supports their position.

In *State v. Uhler*, 1916, 32 N.D. 483, 502, 156 N.W. 220, 226, "steal" was declared to be "a word of art", importing common law larceny when used in a criminal statute and not defined by the text.

In *State v. Richmond*, 1910, 228 Mo. 362, 365, 128 S.W. 744, 745, the Court said:

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[11] See cases cited in text, and n. 2, *supra*, p. 3.

" 'The word "steal" or "stealing" in a criminal statute when unqualified by the context, signifies a taking which at common law would have been denominated felonious and imports the common law offense of larceny.' The American and English Encyclopedia of Law, vol. 23, p. 555, says: 'The word "steal" has a uniform signification and in common as well as in legal parlance means the felonious taking and carrying away of the personal goods of another.'

". . . In *Hughes v. Territory*, 8 Okla. 32, it is said: 'An examination of the authorities will show that "larceny" and "stealing", at common law, had the same meaning', and such we think is the common understanding. (*State v. Schartz*, 71 Mo. l. c. 504)."[12]

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[12] The cited case, *Hughes v. Territory*, 1899, 8 Okla. Terr. 28, 30-32, contains this significant discussion:

"What did the legislature mean when it used the word 'steal'? There is nothing about the act in which the word appears to indicate that it was intended to place upon it a meaning different from that given to it in its ordinary and legal use. As this word is not defined by our statutes, we will have to look to the lexicographers and law writers for light as to its meaning. The American and English Encyclopedia of Law (volume 23, p. 555) says: 'The word "steal" has a uniform signification, and in common, as well as legal, parlance, means the felonious taking and carrying away of the personal goods of another.' And. Law Dict.: 'Steal: To commit larceny.' Webster's International Dictionary defines the word thus: 'Steal: To take and carry away feloniously; to take without right or leave, and with intent to keep feloniously; as to steal the personal goods of another; to practice, or be guilty of, theft; to commit larceny or theft.' The same author defines 'larceny' to be 'the unlawful taking and carrying away of things personal, with intent to deprive the right owner of the same; theft.' Blackstone uses the words 'larceny', 'steal' or 'stealing', and 'theft', interchangeably. American and English Encyclopedia of Law (volume 12, p. 761): 'Larceny is the wrongful and fraudulent taking and carrying away, by any person, of the mere personal goods of another from any place, with a felonious intent to convert them to his (the taker's) use, and make them his property, without the consent of the owner. As a general rule, "stealing" and "larceny" are synonymous terms,' etc. Bishop, in his work on Criminal Law, (volume 1, p. 431), defines larceny to be 'the taking and removing, by trespass, of personal property, which the trespasser knows to belong, either generally or specially, to another, with the intent to deprive such owner of his owner-

Likewise, in *Gardner v. State*, 1892, 55 N.J.L. 17, 24, we find:

> "Nor is there any ambiguity or uncertainty in the meaning of the word 'steal' in an indictment charging crime. In many of our criminal statutes the word 'steal', 'stealing' or 'stolen' is used without being characterized or qualified by an adverb or adjective; and this mode of drafting criminal statutes extends back into colonial times. *Leam & Spi.* 105. In Dunnell v. Fisk, 11 Metc. 551, 554, Chief Justice Shaw says: 'The natural and most obvious import of the word "steal" is that of a felonious taking of property, or larceny; but it may be qualified by the context.' The word 'steal' or 'stealing' in a criminal statute, when unqualified by the context, signifies a taking which at common law would have been denominated felonious, and imports the common law offense of larceny.".

And in *Satterfield v. Commonwealth*, 1906, 105 Va. 867, 869, 52 S.E. 979, 980, the Court stated:

> "The definition of Webster and other lexicographers of the verb 'to steal' is 'to take and carry away feloni-

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ship therein, and, perhaps it should be added, for the sake of some advantage to the trespasser, — a proposition on which the decisions are not harmonious.' 2 Russ. Crimes, p. 146: 'In a late work of great learning and research, larceny is defined to be "the wrongful or fraudulent taking and carrying away, by any person, of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use and make them his own property, without the consent of the owner, and in a case of recent occurrence, which was reserved for the consideration of the twelve judges, the learned judge who delivered the opinion said that the true meaning of larceny is the 'felonious taking the property of another, without his consent, and against his will, with intent to convert it to the use of the taker.'"'

"An examination of the authorities will show that 'larceny' and 'stealing', at common law, had the same meaning; and consequently stealing, as here defined, is the wrongful or fraudulent taking and removing of personal property, by trespass, with a felonious intent to deprive the owner thereof, and to convert the same to his (the taker's) own use . . ."

ously', and the words 'steal' and 'larceny' are synonyms."

Again, in *Cohoe v. State*, 1907, 79 Neb. 811, 814, 113 N.W. 532, 533, it is said:

> "The section does not define 'larceny', and does not prescribe what acts shall constitute 'stealing', and early in the jurisprudence of this state it was decided that resort must be had to the common law to ascertain the constituent elements of the crime. *Thompson v. People*, 4 Neb. 528. And in *Barnes v. State*, 40 Neb. 546, 59 N.W. 125, it was determined that the word 'steal' as used in this section of the criminal code, includes all the elements of larceny at common law, . . ."[13]

This Court, in *Morissette v. United States*, 342 U.S. 246, 271, in effect equated "steal" with common law larceny when it said:

> "Probably every stealing is a conversion, but certainly not every knowing conversion is a stealing. 'To steal means to *take away from one* in lawful possession without right with the *intention to keep wrongfully.*' (Italics added.) *Irving Trust Co. v. Leff*, 253 N.Y. 359, 364, 171 N.E. 569, 571."

This definition of steal does not embody the offense of embezzlement, for the latter does not involve a taking from one in lawful possession.[14]

Thus it appears that at the time of the passage of the Dyer Act the word "steal" had a settled judicial meaning synonymous with larceny at common law. Likewise it is well settled that when a common law term is employed in

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[13] See also *State v. Chambers*, 1849, 2 Greene (Iowa) 308; *State v. Frost*, Mo. 1926, 289 S.W. 895; *Riley v. State*, 1938, 64 Okla. Cr. 183, 78 P. 2d 712; *State v. Gugel*, 1935, 65 N.D. 587, 260 N.W. 581; *State v. Tough*, 1903, 12 N.D. 425, 96 N.W. 1025.

[14] See *Moore v. United States*, 160 U.S. 268.

a criminal statute and is not defined by that statute, the common law meaning prevails. In *United States v. Cardish*, 1906, 143 Fed. 640, 642, (E.D. Wis.), the court said:

> "It is hardly conceivable that Congress would have contented itself with the employment of the technical term 'arson', having a well understood significance in law, if it had intended to include all statutory offenses of kindred nature.
>
> "The rule seems to be well settled that when Congress by statute refers to or adopts a common law offense, without further definition, the common law definition must obtain . . ."[15]

Had Congress wished the Dyer Act to cover other than common law larceny, it could have broadened its coverage beyond that afforded by use of the word "stolen" standing alone, through the simple addition of other words similar to those used by it in many other criminal statutes. Examples of such phraseology are set out in the footnote.[16]

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[15] Many cases so hold: *Keck v. United States*, 172 U.S. 434 (smuggling); *Harrison v. United States*, 163 U.S. 140 (robbery); *United States v. Carll*, 105 U.S. 611 (forgery); *United States v. Smith*, 5 Wheat. 153 (piracy); *United States v. Palmer*, 3 Wheat. 610 (robbery); *United States v. Brandenburg*, 144 F. 2d 656 (C.A. 3) (burglary); *United States v. Patton*, 120 F. 2d 73 (C.A. 3) (larceny); *United States v. Outerbridge*, Fed. Cas. No. 15,978 (murder); *United States v. Armstrong*, 2 Curt. 451, Fed. Cas. No. 14,467 (manslaughter); *In re Greene*, 52 Fed. 104 (C.C.S.D. Ohio); *United States v. Coppersmith*, 4 Fed. 198 (C.C.W.D. Tenn.) (felony); *United States v. Clark*, 46 Fed. 633; *United States v. Altmeyer*, 113 F. Supp. 854 (D.C.W.D. Pa.) (extortion).

[16] 18 U.S.C. sec. 641: "embezzles, steals, purloins, or knowingly converts . . ." (public money, property or records); 18 U.S.C. sec. 642: "secretes within, or embezzles, or takes and carries away . . ." (tools and materials of U.S. for counterfeiting purposes); 18 U.S.C. sec. 655: "steals or unlawfully takes, or unlawfully conceals . . ." (money, etc. by bank examiner); 18 U.S.C. sec. 656: "embezzles, abstracts, purloins, or willfully misapplies . . ." (money, etc. by bank employee); 18 U.S.C. sec. 657: "embezzles, abstracts, purloins, or willfully misapplies . . ." (money etc. by employee of federal lending, etc. institution); 18 U.S.C. sec. 658: "conceals, removes, disposes of,

Common law meanings aside, this Court has said that a word having a judicially settled meaning is presumed to have been used in that sense in a statute. *United States v. Merriam*, 263 U.S. 179.[17] Here, in the absence of any indication to the contrary, it must be presumed that Congress used the word "steal" in accordance with settled principles of statutory construction and as defined by the existing body of judicial decisions, i.e., as a term meaning common law larceny.

C. To Hold That The Word "Stolen" Encompasses All "Unlawful", "Wrongful" Or "Dishonest" Takings Would Violate The Principle Of Strict Construction Of Criminal Statutes And Would Either Destroy The Uniformity Of The Act's Application Or Raise Grave Doubts As To Its Constitutionality.

To say that the word "steal" is a common law term which must be presumed to have been used in the Dyer Act in its common law sense because it is undefined by the text is

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or converts . . ." (property of farm credit agency); 18 U.S.C. sec. 659: "embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains . . ." (baggage moving in commerce); 18 U.S.C. sec. 660: "embezzles, steals, abstracts, or willfully misapplies . . ." (funds of carrier); 18 U.S.C. sec. 663: "embezzling, stealing, or purloining such gift, or converting the same . . ." (money solicited for United States); 18 U.S.C. sec. 1704: "steals, purloins, embezzles, or obtains by false pretenses . . ." (keys or locks — mail containers); 18 U.S.C. sec. 1707: "steals, purloins, or embezzles . . . or appropriates . . . to . . . any other than its proper use . . ." (post office property); 18 U.S.C. sec. 1708: "steals, takes, or abstracts, or by fraud or deception obtains . . ." (mail matter); 18 U.S.C. sec. 2314: "knowing the same to have been stolen, converted or taken by fraud . . ." (transportation of articles used in counterfeiting); 18 U.S.C. sec. 2315: "knowing the same to have been stolen, unlawfully converted, or taken . . ." (sale or receipt of such articles).

[17] Accord, *Case v. Los Angeles Lumber Co.*, 308 U.S. 106, *rehearing denied*, 308 U.S. 637; *Coates v. United States*, 181 F. 2d 816 (C.A. 8).

States v. Handler, 142 F. 2d 351 (C.A. 2).[21] Indeed, appellant has admitted that "the word 'stolen' as used in the statute should be given a uniform meaning throughout the country." (Jurisdictional Statement, p. 3).

In addition the word "unlawfully" raises the question whether all unlawful takings under the statutory extensions are to be included. If so, this would include within the Dyer Act those takings without permission motivated by mischief, or with intent to shortly return — the so-called "joy riding" offense. "Joy riding" has been summarily rejected from the scope of the word "steal". *United States v. Trinder*, 1 F. Supp. 659 (D. Mont.). Cf. *Morissette v. United States*, 342 U.S. 246, 271; *United States v. Kemble*, 197 F. 2d 316 (C.A. 3). We know of no case to the contrary, nor can we conceive that Congress intended this type of taking to be within the Dyer Act. Yet it should logically be so if Congress equated "stolen" with "unlawfully taken".

To equate "stolen" with "wrongfully taken", "dishonestly taken" or "taken without right" raises grave constitutional questions, for there is no accurate and exact definition of these words known to the law. If they mean only "unlawful" the questions discussed above arise. If they involve a moral concept, there can be little doubt of their vagueness and uncertainty.

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[21] The court below noted "Some states have passed statutes broadening the definition of larceny and wiping out the distinctions between the old common law crimes. But there has been no uniformity in such statutes . . ." 141 F. Supp. 531. Cf. 2 *Clark & Marshall on Crimes*, 1900, Section 341: "Embezzlement is a statutory and not a common law offense. The statutes vary so much in the different jurisdictions that it is impossible to frame a definition that will apply in all . . ."

The difficulty is pointed up by two Eighth Circuit cases, *Carpenter v. United States*, 113 F. 2d 692, and *Abraham v. United States*, 15 F. 2d 911, where the court examined the statute law of the states where the offenses occurred to determine guilt under the Dyer Act. Thereafter the court, in *Ackerson v. United States*, 185 F. 2d 485, gave "stolen" its common law meaning.

Circuit Judge Biggs, writing for a three judge court in *International Longshoremen's and Warehousemen's Union v. Ackerman*, 82 F. Supp. 65, 105 (D. Hawaii),[22] said:

> "The clause of Section 11120 referred to makes two or more persons guilty of conspiracy if they concert together to do '* * * what is obviously and directly wrongfully injurious to another * * *' and renders the section too vague to withstand attack. The word 'wrongfully' is not a term of art in the criminal law. It means 'In a wrong manner; unjustly; in a manner contrary to the moral law, or to justice.' Bouvier's Law Dictionary, Rawle's Third Revision. Cf. the term *'Wrong'*, Black's Law Dictionary, Third Edition. The test supplied by the statute is, therefore, one of moral law. . . . This portion of the statute clearly does not meet the test of certainty."

It is well settled that when two interpretations of a statute are possible, this Court will adopt that construction which avoids any grave danger of unconstitutionality. This does not mean that the Court must decide the constitutional issue first; the duty is to avoid danger of unconstitutionality. *United States v. C.I.O.*, 335 U.S. 106, 120-121; *United States v. Standard Brewery*, 251 U.S. 210, 220; *United States v. Delaware and Hudson Co.*, 213 U.S. 366, 407-408. Here this means interpreting "stolen" as coterminous with common law larceny. To hold otherwise is to raise grave doubt of constitutionality.[23]

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[22] *Rev'd on other grounds, Ackerman v. International Longshoremen's and Warehousemen's Union*, 187 F. 2d 860 (C.A. 9), *cert. denied*, 342 U.S. 859.

[23] Cf. *Connally v. General Construction Co.*, 269 U.S. 385, 391, quoted with approval, *Lanzetta v. New Jersey*, 306 U.S. 451, 453:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague

D. The Cases Broadly Interpreting The Dyer Act Have Misconstrued The Precedents Upon Which They Rely, And Have Failed To Adequately Consider The Effect Of Their Interpretations Upon The Administration And Constitutionality Of The Act.

The cases giving broad effect to the word "stolen" in the Dyer Act all stem from the decision of District Judge Miller in *United States v. Adcock*, 1943, 49 F. Supp. 351 (W.D. Ky.). Judge Miller found the term to have "the well known and accepted meaning of taking the personal property of another for one's own use, without right or law."[24] In support of this definition are cited *United States v. Trosper*, 127 Fed. 476 (S.D. Cal.); *Russell v. United States*, 119 F. 2d 686 (C.A. 8); and *Isbell v. United States*, 26 F. 2d 24 (C.A. 8). The *Trosper* case, however, involved Rev. St. sec. 5469, which condemned anyone who "shall steal", "shall take", or "shall by fraud or deception obtain" United States mail. Here the intention of Congress to cover more than common law larceny is clear.[25] The *Russell* and *Isbell* cases involved offenses which were clearly common law offenses. Certainly the Eighth Circuit does not draw Judge Miller's conclusion from its decisions in *Russell* and *Isbell*, for the Eighth Circuit has held the Dyer Act to cover only common law larceny. *Ackerson v. United States*, 1950, 185 F. 2d 485.

Since Judge Miller's decision (and after his rise to the bench of the Sixth Circuit), the Sixth Circuit has followed

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that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

[24] 49 F. Supp. 353. The fact that this definition either forces a dependence upon state statutory law and destroys the uniform application of the Dyer Act, or else may render the Act unconstitutional, is discussed herein at pages 12-16. The Court showed no awareness of this problem.

[25] See discussion, pp. 19-20.

the *Adcock* case on four occasions.[26] The first, *Davilman v. United States*, 1950, 180 F. 2d 284, is a one paragraph *per curiam* adoption of the *Adcock* opinion. None of the cases cites supporting authority outside the Sixth Circuit other than *United States v. Sicurella*, 1951, 187 F. 2d 533 (C.A. 2), which contains a one sentence dictum by Judge A. Hand stating that "a narrow common law definition is not required under the Dyer Act." But in *United States v. Shailer*, 1953, 202 F. 2d 590, *cert. denied*, 347 U.S. 947, the Second Circuit, faced with a situation where it could have easily disposed of its case by adopting this dictum, chose not to refer to the *Sicurella* opinion in any way and to decide the case on other grounds.

Four days after the decision of the District Court in this case, the Ninth Circuit decided *Smith v. United States*, 233 F. 2d 744, and became the second Circuit to adopt as law a broad interpretation of the word "stolen" in the Dyer Act. In the *Smith* case the court quoted from *Adcock*, *supra*, and stated that since automobiles may be obtained by thieves in many ways, "Congress would have no reason to differentiate among the various theft crimes . . ."[27] Like its predecessors, this brief opinion evidences scant consideration of the issues involved.

The most recent Dyer Act opinion is *Boone v. United States*, 1956, (4th Cir.), 235 F. 2d 939, which again quotes and relies upon Judge Miller's statement in the *Adcock* case. But the Court examines more fully than did the other

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[26] *Davilman v. United States*, 1950, 180 F. 2d 284; *Collier v. United States*, 1951, 190 F. 2d 473; *Breece v. United States*, 1954, 218 F. 2d 819; *Wilson v. United States*, 1954, 214 F. 2d 313.

[27] 233 F. 2d 747. The court, however, admits that typically an unattended car is taken, and "it must be conceded that this was the situation which particularly concerned Congress in the debates on the bill . . ." 233 F. 2d 747.

Circuits the meaning of the word "stolen" and concludes that the word had no certain definition at common law. The case law cited in support of this conclusion is *United States v. Stone*, 1881, 8 Fed. 232 (C.C.W.D. Tenn.); *United States v. Jolly*, 1888, 37 Fed. 108 (D.C.W.D. Tenn.); and *Crabb v. Zerbst*, 1938, 99 F. 2d 562 (C.A. 5). Appellee cannot agree that these cases are authority for a broad interpretation of "stolen" in the Dyer Act. Each of these cases involved a statute containing words additional to "steal" which clearly indicated a Congressional intent to broaden the scope of the statute beyond common law larceny.[28] It should be reiterated that appellee does not contend that "stolen" *cannot* be used in a statute in a sense broader than common law larceny, but only that it takes the latter meaning when otherwise undefined.

This distinction is clearly pointed out by the judge himself in one of the cases heavily relied upon by the Fourth Circuit and by appellant here, for in *United States v. Stone*, *supra*, at 249, Judge Hammond says:

> "If Congress had said that every person who shall *steal* goods belonging to a wreck, using no other words, I should probably hold it to denounce only acts constituting larceny at common law, in obedience to our familiar rule of construction that when Congress defines a crime by only using its common law name, we

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[28] The same is true of other cases cited by appellant in its brief: *United States v. O'Connell*, 165 F. 2d 697 (C.A. 2), *cert. denied*, 333 U.S. 964; *United States v. De Normand*, 149 F. 2d 622 (C.A. 2), *cert. denied*, 326 U.S. 756, 808, 811; *United States v. Handler*, 142 F. 2d 351 (C.A. 2), *cert. denied*, 323 U.S. 741. In the latter case the court noted that a House Amendment to the National Stolen Property Act adding the words "or taken feloniously by fraud or with intent to steal or purloin" was a clear indication of intent to broaden the statute beyond "what would have been reached by the word 'stolen' ". 142 F. 2d 353.

> interpret it by the common law. Associated, as in this statute, with 'plunder' and 'destroy' I have no doubt it means a great deal more . . ."[29]

In this connection it is significant that the Fifth Circuit, while giving a broad interpretation to the statute involved in *Crabb v. Zerbst, supra,* held in *Murphy v. United States,* 206 F. 2d 571, that "stolen" as used in the Dyer Act encompasses only common law larceny.[30]

In the *Boone* case the court also makes much of the fact that 18 U.S.C. sec. 659, which brands as criminal one who "embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains" goods or chattels from commerce, groups all the above at two points in its text under the phrase "embezzled or stolen". "Thus", says the court, "Congress expected 'stolen' to embody 'fraud or deception'."[31] That is true, but it is not true that this is a key to the meaning of "stolen" in the Dyer Act, for in sec. 659 "stolen" is given a broad meaning on the face of the statute.[32]

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[29] Cf. cases cited by Judge Hammond at 8 Fed. 248, illustrating that "steal" used alone in a statute means common law larceny, contra when joined with words broader in scope.

[30] Cf. *United States v. Morgan,* 98 F. Supp. 558 (D. Ark.), holding that the breadth of language used in 18 U.S.C. sec. 659 made inapplicable a strict construction similar to that given the Dyer Act in *Hite v. United States,* 168 F. 2d 973 (C.A. 10).

[31] 235 F. 2d 941.

[32] The *Boone* case involved a taking by false pretenses. The present case involves embezzlement. If the court in the *Boone* case is correct in saying with respect to the Dyer Act and sec. 659 that "The Congressional intent is disclosed by the contemporaneous use of the same expression in a related statute" (235 F. 2d 941), then the Dyer Act cannot cover the present case, since in sec. 659 it is surely true that whatever "stolen" encompasses in the phrase "embezzled or stolen", it does not encompass embezzlement.

Thus it appears that no court broadly interpreting the Dyer Act has grasped the significance of the difference in the language of that Act and the language of the statutes involved in the cases which are cited as precedent. Neither have they considered the effect of a broad interpretation of the Act upon its administration and constitutionality. It follows that the authority of these cases should not weigh heavily with this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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